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REPORT ON THE ADVISABILITY
OF PERMITTING ELECTRONIC
RECORDING OF COURT PROCEED-
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Report on the Advisability of Permitting
Electronic Recording of Court Proceedings
for News Purposes.

Advisory Committee on Media
Coverage of the Courts

June 1, 1979

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SUPREME JUDICIAL COURT RULE 3:25, CANON 3A(a) and (b)

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NOTE

In ordinary usage the term media may be applied to various informational systems. Television, radio, still photography, motion pictures and the pencil press, at one time or another, may each have been referred to as "the media".

For the purposes of convenience and consistency in this report, however, the terms media, media coverage and simply coverage are intended to apply only to television, radio, still photography and motion picture film.

The pencil press shall not be included in this term where the effect would be to limit or infringe upon any right, privilege or practice which the pencil press currently enjoys in providing coverage of judicial proceedings.

FOREWORD

In January of 1979 the Justices of the Supreme Judicial Court appointed an Advisory Committee on Media Coverage of the Courts and thereby expressed their intention to consider the desirability of amending the rule of court which generally prohibits the filming, video taping and electronic recording of court proceedings for news media purposes.

Supreme Judicial Court Rule 3:25, Canon 3A(7)(a) and (b) is part of the Code of Judicial Conduct and provides that:

(7) A judge should prohibit broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto during sessions of court or recesses between sessions, except that a judge may permit:

(a) the broadcasting, televising, recording or photographing of investitive, ceremonial, or naturalization proceedings; and (b) when authorized by rules of court the use of electronic or photographic means for the presentation of evidence, for the perpetuation of a record for other purposes of judicial administration, or for the preparation of materials for educational purposes.

Under this Rule, proceedings in both the Supreme Judicial Court and several departments of the Trial Court have been filmed or recorded for television broadcast but only for educational purposes.

In establishing the Advisory Committee the Supreme Judicial Court conformed to a resolution adopted in August of 1978 by the National Conference of Chief Justices which suggested that each state supreme court reconsider the prohibitory provisions relating to the coverage of court proceedings. The Supreme Judicial Court

directed that if the Advisory Committee should conclude that changes in the Rule or its application are desirable, it should file specific recommendations with the Supreme Judicial Court.

The Advisory Committee consists of judges, court personnel, lawyers and representatives of the electronic, photographic and print media who expressed an interest in serving or who were nominated by others in response to the court's announcement of its intention to establish the Committee. Three staff members were also appointed to assist the Committee.

In carrying out its function, the Committee was directed both to rely on its own collective judgment and to solicit the views of other informed individuals.

At the Committee's initial meeting on January 31, 1979 a general discussion of purpose and procedure was begun, the thread of which was continued through the subsequent three monthly gatherings. As a result of this discussion, it was decided that the Committee would make recommendations only on those issues around which there was a consensus. It was further agreed that in order to accommodate the possibility of diverging views that individuals members would be given an opportunity to submit opposing or minority opinions with this report.

The second committee meeting was held in an actual jury courtroom where a demonstration of how camera coverage of proceedings might be conducted was made by representatives of the local public television station and by a representative

of the Greater Boston Press Photographers Association. In addition the committee staff distributed a packet of reading materials which included a summary of the relevant rules in other jurisdictions, as well as position papers on each side of the question of allowing coverage. A more extensive list of law review articles and other reference material was also made available to each member on request.

Prior to the third committee meeting the staff conducted a questionnaire survey of the committee. A sample copy of that questionnaire is included in the appendix to this report.

The third meeting was held on April 5, 1979. A videotaped debate between several nationally recognized legal scholars held in Princeton, New Jersey and presided over by several eminent jurists was shown. A general discussion followed. A second videotape produced jointly by several of the commercial television outlets in the state of Washington was also made available for viewing. That tape was primarily a representative demonstration of television news coverage of a criminal trial on a charge of negligent homicide with a motor vehicle. An attitudinal survey by the trial judge of the participants in the trial followed the trial itself.

The fourth meeting involved more general discussion. The results of the questionnaire were reported and the staff was directed to prepare the final recommendations concerning the consensus issues.

The purpose of the fifth meeting was to review and ratify the report.

A special note of thanks is appropriate at this time for the time, effort and interest which each member devoted to the consideration of the complex issues before the Committee. Gratitude should also be expressed for the assistance which was so willingly and fully given by the National Center for State Courts in Williamsburg, Virginia.

The Committee is aware of the continuing interest of the National Center and would hope that the aid of such a capable resource will be freely sought by others who become interested in the subject at hand in the future.

A final note of acknowledgement is due to the Committee Staff for their work in preparing this Report. Without their able assistance, our responsibilities as a committee would not have been met as efficiently or as enjoyably.

Herbert F. Travers, Jr.,
Chairman

DEVELOPMENT OF POLICY GOVERNING MEDIA COVERAGE OF THE COURT.

Rules Prohibiting Coverage.

Until recently the only view of our judicial courtroom system for the public at large was provided by television drama. For many, our legal system was just as portrayed on Perry Mason and The Defenders, shaded occasionally by the representations of courtroom artists.

Modern rules prohibiting media coverage of courtroom proceedings can be traced back to the 1930's, deriving their inspiration from the 1935 trial of Bruno Hauptmann, the man accused of kidnapping and murdering the son of Charles Lindbergh. (State v. Hauptmann, 115 N.J.L. 412, 180 A.809 [1935]). Lindbergh was America's hero, and as a result the trial generated special kinds of public interest and excitement well beyond the notorious aspects of the crime itself.

The courtroom was crowded with spectators and reporters. Confusion and disorder reigned despite the court's efforts to preserve order. The audience repeatedly erupted into loud outbursts. Although the jury was sequestered, the hotel where they lived was populated by reporters and curious members of the public. Stories in ^{the} newspapers and on the radio were conveyed to the jury. Nevertheless, the jurors indicated their ability to remain impartial in spite of these unusual departures from courtroom decorum. The appellate court

affirmed Hauptmann's conviction, concluding that a great deal of publicity is not necessarily a reason to nullify the result of a trial.

Following the Hauptmann trial, the American Bar Association adopted Canon 35 of the Canons of Judicial Ethics. Designed to prevent further abuses of the judicial system through the reporting of sensational trials, ABA Canons are only guidelines without the force of law unless embraced by state law or rule of court. After Canon 35 was promulgated, it was adopted in virtually every state.

With the advent of television, Canon 35 was amended, and in 1952 language was added to include a prohibition against television coverage of trials. The Canon read:

"Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the courtroom, during sessions of the court or recesses between sessions and the broadcasting or televising of court proceedings are calculated to detract from the essential dignity of the proceedings, distract the witness in giving his testimony, degrade the court and create misconceptions with respect thereto in the mind of the public and should not be permitted."

In a 1972 update the ABA adopted Canon 3 A (7) which stated:

"A judge shall prohibit broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto during sessions of court or between sessions, except that a judge may authorize [broadcasting and photographing in certain circumstances].

Those certain circumstances include the use of electronic or photographic means for the perpetuation of a record or the presentation of evidence for purposes of judicial administration; broadcasting and recording ceremonial proceedings;

and photographic or electronic recording to be utilized only for instructional purposes in educational institutions; provided that the parties have consented, the recording does not distract, and the broadcast will not take place until after the conclusion of the proceedings.

Federal Rules.

Just as media coverage is prohibited within the states by ABA Canons, The Federal Rules of Criminal Procedure, which became effective in 1946, contain a rule entitled "The Regulation of Conduct in the Courtroom"/which prohibits the (Fed. R. Crim. P., Rule 53) "taking of photographs in the courtroom during the progress of judicial proceedings or radio broadcasting of judicial proceedings from the court. . . ."

In the 1960's the Judicial Conference of the United States in advisory guidelines twice expressed its intention to go beyond the prohibition against in-court broadcasting during criminal proceedings. In 1962 the conference passed a resolution stating that it condemns:

". . . the taking of photographs in the courtroom or its environs in connection with any judicial proceedings, and the broadcasting of judicial proceedings by radio, television, or other means, and considers such practices to be inconsistent with fair judicial procedure . . ."

In 1965 the Conference reaffirmed its 1962 resolution, clarifying that Rule 53 should apply "to all proceedings in United States Courts, including ceremonial proceedings, and to all proceedings before U.S. Commissioners wherever held."

[Judicial Conference Reports, quoted in Wright's Federal Practice § 861].

Then, after a three year study on the effect of publicity on a defendant's right to a fair trial, the Conference adopted guidelines in 1968 which covered topics including the release of information by attorneys and courthouse personnel; the conduct of judicial proceedings; and photography, radio, and television equipment. The guidelines in relevant part stated:

"It is recommended that each United States District Court adopt a rule of court providing in substance as follows:

The taking of photographs in the courtroom or its environs or radio or television broadcasting from the courtroom or its environs, during the progress of or in connection with judicial proceedings, including proceedings before a United States Commissioner, whether or not court is actually in session, is prohibited.

Such a rule should define the area included as environs as each place where judicial proceedings are held."

Rules Allowing Coverage

In 1956 Colorado modified its Canon 35 and thereby became the first state to allow coverage of trials. Writing for the court, Justice Otto Moore took the position that broadcasting may be allowed without impinging on the judicial process. The arguments against media coverage were discounted by Justice Moore when weighed against the need to inform the public about the processes of government. He concluded that actual experience revealed participants to be more circumspect in behavior while under the eye of the camera. He noted that the

equipment was unobtrusive and that equipment pooling by several stations could keep confusion to a minimum. Moreover, those involved in occurrences of public interest were held to have no right to privacy from broadcast. Justice Moore concluded that the evidence and demonstrations presented to him "proved conclusively that the assumption of facts as stated in the Canon [that media detract from dignity, distract witnesses, degrade the court, and so on] is wholly without support in reality." In re Hearings Concerning Canon 35, 296 P.2d 465, 468 (1956).

Between 1959 and the notorious case of Billy Sol Estes (see *infra*) in 1965, coverage was allowed in Texas. In Oklahoma there was a brief period of coverage between a court decision in 1958 and the 1959 adoption of Canon 35.

In 1963 the Colorado Bar Association voted to advocate a more liberal Canon 35 based on its successful experience with allowing media coverage. But the movement to allow media access to the courts did not begin in full until the mid-70's. Perhaps it can be seen as a part of the same post-Watergate trend which brought sunshine regulations, financial disclosure rules, and even more relevant--the live broadcasting of sessions of the United States Congress.

Alabama was the first to renew the movement toward change authorizing coverage at the discretion of the trial judge within certain limits calling for state Supreme Court approval of the courtroom plan, consent by the parties,

and suspension if a participant specifically objects. Beginning in 1976, Texas and Washington provided for media access. Currently, Texas allows coverage of oral arguments in appellate courts upon consent of the court. Washington allows coverage of trials in which the trial judge grants permission, but provides that coverage will be suspended upon the objection of any participant. Georgia in 1977 allowed coverage upon prior approval of the plan.

In addition to permanent policies of coverage, pilot programs abound. The first was in Florida during 1977 and 1978.* Now there are experiments ongoing in Alaska, California, Idaho, Louisiana, Minnesota, Montana, North Dakota, Oklahoma, New Jersey, West Virginia, Ohio, Wisconsin and Arizona.

In August, 1978, the Conference of State Chief Justices voted a resolution which recommended modification of the ABA Canon. In the amendment proposed by the Conference, appellate courts would establish guidelines so that coverage in courts under their supervision could proceed "in a manner that will be unobtrusive, will not distract the trial participants, and will not otherwise interfere with the administration of justice." The commentary to the proposed Canon 3A (7) stated that

" . . . These guidelines should include the type and location of equipment, the discretion left to the individual trial or appellate court, and the necessity, if any, to obtain the consent of the participants. . . . Special circumstances may exist in all courts for the restriction of this type of coverage in cases such as rape, custody of children, trade secrets, or where such coverage would cause a substantial increase in the threat of harm to any participants in a case."

*The Florida Supreme Court recently authorized unrestricted coverage on a permanent basis.

It was further resolved that the National Center for State Courts should be the clearinghouse for information regarding various jurisdictions.

The liberalization trend has not escaped the ABA. In August 1977 the ABA Advisory Committee on Fair Trial and Free Press proposed revised standards for its second edition. The 1968 edition had contained no reference to television coverage, but in line with the emerging tendency, the new Section 8-3.6(a) stated:

"Television, radio, and photographic coverage of judicial proceedings is not per se inconsistent with the right to a fair trial. Subject to conditions and restrictions established by local rule or by agreement with representatives of the news media, such coverage should be permitted only if the court in the exercise of sound discretion concludes that it can be conducted unobtrusively and without distracting the attention of trial participants."

In its recommendation to endorse the new rule, the Criminal Justice Section suggested 1) that media should generally be excluded from proceedings which exclude the public, 2) that parties and witnesses should be allowed to request that their testimony not be covered, and 3) that a clearinghouse should be established "for information obtained about and by electronic media coverage."

Although two previous committees (The Committee on Association Standards for Criminal Justice, and the Committee on Criminal Justice and the Media) had endorsed the new standard, the full council of the Section on Criminal Justice ^{it} voted not to support/in April 1978. At the February 1979 ABA meeting, the House of Delegates also rejected the proposed standard.

For a summary of the prevailing rules in the state courts see the appendix to this report.

SURVEY OF RELEVANT LAW

Beginning in the 1960's, even after the enactment of the Federal Rules and the ABA Canons prohibiting media coverage, cases reached the courts which continued to illustrate the tension between the accused's sixth amendment right to a fair trial free from prejudicial publicity and the first amendment right to a free press. As we address the issue of media coverage of the courts today, this tension still prevails. The following material offers an analysis of the development of these competing rights as well as a discussion of related legal questions.

A. Rights of a Criminal Defendant.

The principal issue raised by media coverage of judicial proceedings is that it may result in the denial of a fair trial to a criminal defendant. In Irvin v. Dowd, 366 U.S. 717 (1961), a series of murders had created great public concern, and pretrial newspaper publicity illustrated a pattern of deep prejudice against the man accused of the crimes. Eight of the twelve jurors empanelled for the Irvin trial admitted that they had already believed the defendant to be guilty as a

result of the pre-trial publicity. On appeal, the Supreme Court reversed the conviction, stating that a fair trial requires a panel of impartial, indifferent jurors and a verdict based on evidence presented at trial rather than extrinsic evidence. Justice Frankfurter wrote in a concurring opinion about the balance between freedom of the press and the judicial system's mandate to search for the truth:

"This court has not yet decided that the fair administration of criminal justice must be subordinated to another safeguard of our constitutional system — freedom of the press, properly conceived. The court has not yet decided that, while convictions must be reversed and miscarriages of justice result because the minds of jurors or potential jurors were poisoned, the poisoner is constitutionally protected in plying his trade."
(366 U.S. at 730)

Rideau v. Louisiana, 373 U.S. 723 (1963) concerned a twenty-minute film that had been made of a pre-arraignment interview between the defendant and the sheriff. During the interview the defendant confessed to robbery, kidnapping, and murder. The film was televised three times and three of the empanelled jurors admitted seeing it. None, however, apparently had formed opinions prior to trial regarding the defendant's guilt as in Irvin. Nevertheless, the Court noted that the community had been so pervasively exposed and prejudiced that the trial was merely a formality. Wide community exposure even without actual prejudice on the part of the jury was found sufficient to create a violation of the defendant's rights.

The disruption of courtroom proceedings as well as prejudicial publicity have been held by the Supreme Court to deny a defendant a fair trial. Estes v. State of Texas, 381 U.S. 532 (1965) is the leading case with respect to television coverage of trials. It is the only Supreme Court case involving an appeal from a trial at which the electronic media were present in the courtroom. ABA Canon 35 was not in effect in Texas at the time. Trial judges had discretion to allow media coverage, and in the notorious case of financier Billy Sol Estes, broadcasters and photographers were permitted access despite a pretrial motion to have them excluded.

The decorum usually accorded to the judicial process was fully lacking in the Estes trial. Outside the court there was an equipment bus. Cables and wires snaked around the courtroom. Microphones protruded onto the counsel tables, the bench and the jurors' box. For the trial itself a booth was constructed to house the broadcasters and photographers. (By contrast, cameras had been inside the bar enclosure during the pretrial hearing!) There were as many as twelve cameramen present in the courtroom at one time.

The pretrial hearing, the prosecution's opening and closing statements and the return of the verdict were all televised live. On two stations the whole pretrial hearing was broadcast in place of the late movie and the Tonight Show, with commercial interruptions. On other occasions tapes without sound were broadcast as a video background to news reports of the trial.

In a plurality decision the Supreme Court found that the trial violated Estes' due process rights. The media coverage was found to have disrupted and potentially prejudiced the case by corrupting juror impartiality, impairing the quality of testimony, burdening the trial judge, and harrassing the defendant. The potential for prejudice was so great, said the court, that the trial was prejudicial as in Rideau without a showing of actual harm. The Estes court did not, however, rule that the televising of court proceedings was, per se, unconstitutional but stated that future advances in the field of television might remove any hazards to a fair trial.

In the also famous case of Dr. Sam Sheppard, Sheppard v. Maxwell, 384 U.S. 333 (1966), publicity before and during the trial was virulent and incriminating. According to the decision of the Supreme Court, both the print and broadcast media participated in the "carnival" atmosphere surrounding the proceedings. It involved the live televising of an "inquest" conducted for three days at a high school gym with hundreds of spectators; a prosecutor and judge who were both candidates for judgeships; newsmen who hounded the participants; and newspapers which published inaccurate information that had not been presented as trial evidence.

Emphasizing that the trial court had control of the courtroom and the premises, the Supreme Court stressed that the judge should have limited the presence of the press. Stricter rules were considered appropriate because it was apparent that the accused could be prejudiced or disadvantaged. Furthermore, the court said that the trial court should have insulated the jury and the witnesses and should have "made some effort to

control the release of leads, information, and gossip to the press by police officers, witnesses, and the counsel for both sides." (384 U.S. at 359) With the publicity of such a prejudicial nature and so persuasive as well, in the totality of the circumstances Sam Sheppard was prevented from having a fair trial.

Murphy v. Florida, 421 U.S. 794 (1975) is the most recent Supreme Court pronouncement on prejudicial trial publicity. In this case, the infamous Murph the Surf was accused of armed breaking and entering, with intent to commit robbery. According to the Court, juror exposure to information regarding prior convictions or to news reports of the crime could not alone presumptively deprive the defendant of due process. But where the general atmosphere is sufficiently inflammatory, even a careful voir dire of the jurors and a determination of their impartiality may be disregarded. Citing Irwin, Rideau, Estes, and Sheppard, the Court stated that a totality of the circumstances test is appropriate. The conviction in Murphy was upheld.

The determination of the effect of prejudice is made on the particular facts of each case. Remedies to preserve a defendant's rights in the face of attendant pretrial publicity include change of venue, continuance, extensive voir dire of potential jurors to ensure impartiality, instructions to the jury and jury sequestration. Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976).

In spite of the existence of these remedies, it would appear that the potential for mistrial resulting from the exposure of witnesses and jurors to prejudicial news accounts would be increased by media coverage of trials. Moreover, it would appear to place an additional burden on a trial judge to ensure that any adverse effect of coverage is minimized. Massachusetts case law, however, provides a judge with several options. An order to sequester witnesses is within the discretion of the judge according to Commonwealth v. Watkins, 77 A.S. 2626, 370 N.E.2d 701 (1977). While it has been held in Massachusetts that sequestered witnesses may read newspaper accounts of the trial, Commonwealth v. Hessey, 84 Mass. 173 (1861), a court may order insulation of witnesses from exposure to television or newspaper coverage of a trial. Sheppard v. Maxwell, 384 U.S. 333, 359 (1966). If such an order is violated, a judge has broad discretion to declare a mistrial or take whatever action he may deem appropriate. Commonwealth v. Clark, 75 App. Ct. A.S. 1141, 1147, 334 N.E.2d 68, 72 (1975); Commonwealth v. Parr 1 Mass. App. Ct. 730, 735-36 (1974). Similarly, with respect to jurors, a judge at his discretion may order sequestration to protect the jury from excessive publicity. Commonwealth v. Abbott Engineering, Inc., 351 Mass. 568 (1967).

Furthermore, if a trial judge finds that a juror, sequestered or not, has been exposed to non-evidentiary prejudicial material, he must conduct a voir dire to determine his or her continuing capacity to render an impartial verdict. Commonwealth v. Jackson, 78 A.S. 3062, 3075-76, 383 N.E. 2d 835, 841-42 (1978). Similarly, in a motion for a new trial, a judge may inquire generally whether a jury verdict may have been based on consideration of media accounts of the trial. No inquiry may be made, however, into the actual effect of

media accounts on the jury's decision. Commonwealth v. Fidler, 79 A.S. 240, 385 N.E.2d 513 (1979); Woodward v. Leavitt, 107 Mass. 453 (1871). Thus, while media coverage may create a series of additional considerations for an already heavily burdened judiciary in ensuring the impartiality of jurors and witnesses, the nature of the problems do not appear to be insurmountable from a current legal perspective. It should be marked well, however, that the price of an abuse of a defendant's rights is likely to be a continuance of the trial, or a mistrial, or a reversal of a conviction. Experience suggests that in many cases the defendant will never go to trial again.

B. Right to Privacy.

There are currently circumstances in which the public and all media, with some exceptions, are excluded from court proceedings, presumably to safeguard the privacy of the participants. Under Massachusetts law, the public is excluded from juvenile sessions (G.L. c. 119, §65); from the trial of certain sex offenses (G.L. c. 278, §§16A and 16C); and from the trial of crimes involving husband and wife (G.L. c. 278, §16B). In addition, a judge may "impose reasonable cloture, including impoundment [of papers in the case],...when found necessary." Ottaway Newspapers, Inc. v. Appeals Court, 1977 A.S. 973, 981, 362 N.E.2d 1189, 1194 (1977).

In pre-trial matters, it is within the discretion of the judge to close the courtroom if there is a "substantial likelihood" of interference with the defendant's "right to a fair trial by an impartial jury." ABA Advisory Committee on Fair Trial and Free Press, Standards Relating to Fair Trial and Free Press, Standard 3.1 and Comments, pp. 113-118 (Approved

Draft 1968) cited with approval in Commonwealth v. Jackson, 75 App. Ct. A.S. 743, 746, 327 N.E.2d 910, 914 (1975).

The constitutionality of closing both pre-trial proceedings and trials is an issue which has come under frequent challenge. Recently, a single justice of the Supreme Judicial Court in Globe Newspaper Co. v. Justices of the Superior Court, No. 79-191, upheld the action of the trial judge in excluding the public and the press from a trial involving sex offenses where the victims were minors (see G.L. c. 278, §16A). The case is currently on appeal to the full bench. The constitutionality of closing the court during pre-trial motions at the discretion of the trial judge is currently before the United States Supreme Court. Gannett Co. v. DePasquale, No. 77-1301, argued 11/7/78.

In prior decisions the Supreme Court has ruled that the right of privacy guaranteed by the Constitution (see Griswold v. Connecticut, 381 U.S. 479 [1965]) fades when the issues or information involved is a matter of public record. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 494-95, 95 S.Ct. 1029, 1046 (1975). An action against the media for invasion of privacy failed in the Cox Broadcasting case when a father sued the media for publishing his daughter's name as a rape victim. In its decision, the court stated, "the right to privacy is not invaded by any publication made in a court of justice" at 420 U.S. 493, 955 S.Ct. at 1045, citing the seminal article on right to privacy by Warren and Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193 (1890). The Cox Court distinguished such right to privacy claims from the traditional tort of invasion of privacy "involving the

appropriation of one's name or photograph, a physical or other tangible intrusion into a private area, or a publication of otherwise private information that is also false although perhaps not defamatory." 420 U.S. at 489, 95 S. Ct. at 1043. In view of the Cox decision, the televising of judicial proceedings would clearly not result in a denial of any right to privacy or in an invasion of privacy. The question of the desirability of protecting participants in certain embarrassing or sensitive matters, however, remains.

C. Rights of the Press.

The rights of the press to be present at trial are derived from the Sixth Amendment guarantee of a public trial rather than from any First Amendment guarantee. In this context, the rights of the press are no greater than those of the general public. In Nixon v. Warner Communications, Inc., 98 S. Ct. 1306 (1978), the Court states on this issue:

The First Amendment generally grants the press no right to information about a trial superior to that of the general public. Once beyond the confines of the courthouse, a news-gathering agency may publicize, within wide limits, what its representatives have heard and seen in the courtroom. But the line is drawn at the courthouse door; and within, a reporter's constitutional rights are no greater than those of any other member of the public." (citations omitted). Id. at 1318.

The press can, therefore, claim no privilege to record court proceedings when such right is not extended to the general public.

The Sixth Amendment guarantee of a public trial is to prevent such abuses as occurred in the English Court of Star Chamber. In Nixon v. Warner Communications, Inc., supra, the Supreme Court rejected any claim that the Sixth Amendment could be relied upon to support a claim of a constitutional right to televise court proceedings. The Court wrote:

Respondents contend that release of the tapes is required by the Sixth Amendment guarantee of a public trial. They acknowledge that the trial at which these tapes were played was one of the most publicized in history, but argue that public understanding of it remains incomplete in the absence of the ability to listen to the tapes and form judgments as to their meaning based on inflection and emphasis.

In the first place, this argument proves too much. The same could be said of the testimony of a live witness, yet there is no constitutional right to have such testimony recorded and broadcast. Estes v. Texas, supra, at 539-542. Second, while the guarantee of a public trial, in the words of Mr. Justice Black, is "a safeguard against any attempt to employ our courts as instruments of persecution," In re Oliver, 333 U.S. 257, 270 (1948), it confers no special benefit on the press. Estes v. Texas, 381 U.S. at 583 (Warren, C.J., concurring); id. at 588-589 (Harlan, J., concurring). Nor does the Sixth Amendment require that the trial--or any part of it--be broadcast live or on tape to the public. The requirement of a public trial is satisfied by the opportunity of members of the public and the press to attend the trial and to report what they have observed. Ibid. That opportunity abundantly existed here. (footnotes omitted) Id. at 1318.

While neither the First nor the Sixth Amendment compel the government to give access to or provide information to the press, the First Amendment protects the right of the press to communicate information once it is obtained.

Houchins v. KQED Inc., 98 S. Ct. 2588, 2694 (1978). Once information has been obtained by the press, the government may not, in the absence of those circumstances justifying prior restraint, forbid the publication of such material, Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) or provide for criminal punishment of persons publishing truthful information of confidential proceedings. Landmark Communications, Inc. v. Virginia, 98 S. Ct. 1535 (1970). To prevent publication of material in the interests of justice, careful internal procedures must, therefore, be established to protect confidentiality.

While the press may voluntarily refrain from publishing certain material, such restraint may not be forced upon it by the courts. (Guidelines adopted by the Mass. Bar Press Ass'n are included in the appendix to this report.) The above line of cases provides strong support for the argument that once cameras have recorded a proceeding, the courts are powerless to control or prevent the broadcast of such material.

SUMMARY OF RECURRING ISSUES

Based upon its consideration of contemporary cases and commentary concerning media coverage of courtroom proceedings the committee identified several recurring issues. These can be divided into two broad categories: 1) What is the effect of coverage on trial participants? 2) What is effect of coverage on the public at large? The debate was fueled largely by supposition and conjecture, as there is almost no empirical data on the consequences of allowing cameras in the courtroom.

The Effect on Trial Participants.

Compared to the kind of equipment used in the days of the Estes trial, the tools of modern broadcasting are relatively unobtrusive. Still, however, the issue of whether the expectation of broadcast rather than the distracting physical presence of strange and cumbersome equipment might affect the participants in a trial still persists. It is difficult to assess the potential for prejudicing the rights of litigants arising from the psychological effect of televising. All participants may be affected, from the accused to the court officers, the witnesses, the jurors, the attorneys, and the judges. The dangers, if any, appear to be most pointed in certain kinds of criminal cases.

As to defendants in criminal cases, the following questions arise. Does a defendant have an absolute right not to be displayed? A right in embarrassing cases? Has the publicity-seeking defendant a right to seek coverage? Will

broadcasting encourage copycat offenses, or will it act as a deterrent to others?

How might coverage affect jurors? What will be the effect on jurors if pressured by neighbors and friends (or even strangers) who viewed all or part of a proceeding on television to return a particular verdict? Will they be pressured to conform or will they be encouraged to do their duty more independently? Is it necessary to sequester jurors so that they will be prevented from succumbing to public pressure, or watching selected parts of the trial themselves on the evening news which may emphasize or support a certain interpretation of evidence? Who will pay for the expenses in a trial in which the jurors are sequestered, but would not have been but for the media presence? Judge Thomas Sholts of Florida reported that in the televised Florida v. Herman trial the cost of sequestering was \$11,500. Will there be impartial community members for re-trials or trials of co-defendants once broadcasting begins? Should coverage of some pre-trial evidentiary hearings be prohibited?

The potential effect on witnesses is also important. Will the knowledge of broadcast affect the quality of testimony? Will expectation of broadcast prevent witnesses from coming forward? May juveniles, undercover agents and government informers seek immunity from being broadcast? Should cases involving trade secrets, military secrets or particularly sensitive issues (domestic relations, sexual crimes) be considered less amenable to coverage? Should witnesses be sequestered during a televised trial?

Broadcasting may also affect the attorneys and the judges. Prosecutors who are elected may seek to use media coverage for personal advancement. Will attorneys be reluctant to represent unpopular clients, or will they "grandstand" in the hopes of gaining other clients from the audience? Could judges be influenced by the increased public exposure and the "threat" of adverse publicity? Will they be pressured to conform verdicts and sentences to popular sentiments or will they act more independently? Will the extra work of supervising a media trial distract the judge from his task of assuring a fair trial? Will attorneys similarly be distracted from their task of serving clients?

The Effect on the Public Psyche.

By virtue of the expense involved in interrupting normal programming, television has rarely offered gavel-to-gavel courtroom coverage. Indeed, the Committee was informed that the local commercial television stations could rarely devote more than ninety seconds of an evening news broadcast to a prominent trial. Consequently, some form of comment or analysis must often accompany edited excerpts of a trial. Then the question arises as to what standards will be in the editing process? Will only the most sensational cases or portions be shown in an effort to win ratings? Will reporters without a legal background be able to accurately report on legal proceedings? Will the functioning of the judicial branch be accurately portrayed?

In 1977, over 95% of Americans had televisions and watched an average of over six hours a day. Neilson Television '78, A.C. Neilson Co., Chicago. Most people are used to getting most of their news from television. When they are exposed to the broadcast of trials what will be their reaction? Does the mass communication of judicial events really serve a public purpose? Will the public have more confidence in and understanding of the judicial process if it is opened up to broadcast? Will the judicial process be affected by being seen in between commercials and situation comedies? Will those who will later be participants in the process be affected if they are exposed to broadcast trials on a regular basis?

Reasearch can begin to answer questions such as these. To date, however, little has been done.

RESEARCH ON THE EFFECT OF COVERAGE

Analogous Studies.

Research studies on decision-making and opinion formation have been scrutinized by judicial planners and policymakers. These studies are believed to be sufficiently analogous so that they may be applied to trial participants who are subject to media coverage. To the present time, few studies have been specifically planned and executed to collect data on the courtroom environment. Hence, it has been necessary to extrapolate from the available experiments.

Test Broadcasts.

Recent pilot programs and test broadcasts have provided some feedback concerning the opinions of those who have experienced or participated in a media covered trial. Most of the time participants state that they forgot about the presence of the cameras after a few self-conscious moments at the onset. A productive example is offered in Foldman and Larson, "News Camera in the Courtroom During State v. Solorzano: End to the Estes Mandate?", 10 Southwestern Law Review 2001 (1978). This article reports a trial televised in 1976 in Nevada and contains appendices with the statements of the attorneys, the judge, and the television producer.

The Solorzano trial was apparently only the second comprehensive effort to televise a trial. The first was the trial of a Black Panther accused of resisting arrest which

was filmed in Denver and telecast on educational television in 1970.

After a year of editing the 35 hour Solorzano trial was condensed into five broadcast hours. The trial on a charge of attempted murder, was shown only after all appeals were exhausted. Three broadcasts were presented on commercial TV station KLAS. The programs included testimony and arguments, interviews with attorneys, bench conferences, jury instructions (but not jury deliberations), verdict and sentencing. A live round-table discussion with the public defender, the District Attorney and the Chief District Court Judge concluded the telecasts. The Nevada statutes and court rules prohibited broadcasting and still photography at that time, however, this trial was taped by special arrangement and under certain conditions imposed by the court (for instance, permission of the participants was required, the delayed broadcasting was necessary). Total cost to the station was estimated by the producer to be between \$5,000 and \$10,000 . After Solorzano, permission was granted to cover several other trials in Nevada although no change in the Nevada Rules pertaining to TV coverage has as yet resulted.

The Florida Pilot Study.

The most detailed study of the effects of broadcast is presented by the recently concluded pilot program in Florida. It consisted of questionnaire analysis and the reports of the

opinions of those who participated in trials which were broadcast. These records, though scarcely comprehensive by scientific standards, still represent more than has been made available through any other experimental program to date.

The Florida experiment began in 1975 when the Post-Newsweek stations filed a petition to change the Code of Conduct to allow media coverage of court proceedings. In response, in May of 1975, the Court declined to change the Canon, but did decide to allow the trial broadcast of one civil and one criminal case in its Second Judicial Circuit. Petition of Post-Newsweek Stations, Florida, Inc., 327 So. 2d 1 (Fla. 1976). Because of the difficulty of obtaining the consent of participants the experiment was expanded in September 1976 to include the Ninth Circuit. (Petition of Post-Newsweek Stations, Florida, Inc., 337 So. 2d 801 (Fla. 1976) A supplementary order was issued in December 1976 to again expand the experiment to include the Fourth and Eighth Circuits.

By the time of the experimental program's termination date, April 1, 1977, there still had been no success in obtaining participant consent. (The Committee has been informed that, despite the longevity of the Colorado rule allowing coverage, few trials have actually been taped or televised due to the lack of participant consent. From the experience of these two states, it appears that few trials are televised when participant consent is required.)

The Florida Court considered a test period essential to a reasoned decision on modifying the canon. It therefore authorized a one year pilot program to begin in July 1977. Petition of Post-Newsweek Stations, Florida, Inc., 347 So. 2d 402 (Fla. 1977). During this time, coverage of proceedings was to be allowed without participant

consent but subject to standards of conduct and technology which would be promulgated by the Florida Supreme Court.

The standards were promulgated in June 1977. Petition of Post-Newsweek Stations, Florida, Inc., 347 So. 2d 404 (Fla. 1977). Before the experiment terminated the Post-Newsweek stations requested that the court submit evaluations of the program through March of 1978 and allow the continuation of the experiment after the July 1, 1978 termination pending final decision on amendment of the Canon. The Court established an accelerated briefing schedule--receiving comments only through mid-August 1978--but declined to extend the pilot program. Petition of Post-Newsweek Stations, Florida, Inc., 358 So. 2d 1360 (Fla. 1978)

At the conclusion of Florida's pilot program, the Office of the State Court Administrator was directed by the Court to survey jurors, witnesses, attorneys and court personnel who had been involved in media-covered trials. Questionnaires were distributed to a sample number of participants in July of which 62% were returned by the August 4, 1978 deadline for compilation by the Judicial Planning Coordination Unit of the Office.

The Report, entitled "A Sample Survey of the Attitudes of Individuals Associated with Trials Involving Electronic Media and Still Photography Coverage in Selected Florida Courts between July 5, 1977 and June 30, 1978", began with a disclaimer that as an after the fact survey it did not present the ideal analysis.

"An experiment encompasses the isolation and testing of a new event upon a particular situation. It requires that the experiment compare all aspects of the situation, both prior to and after the occurrence of the event, or through control groups, similar situations where the event occurred and did not occur.

This survey of selected trial participants cannot be considered an experiment. No attempt was made to determine the reactions of participants of trials which did not involve media coverage. The information which is contained in this document must be reviewed with this thought in mind to ensure that erroneous interpretations or invalid applications of the data do not result."

(Report, at p. 6)

The questionnaire asked whether the participants had been made more informed, disrespectful, self-conscious, nervous, attentive, responsible, afraid of harm or influence; whether the presence of the media disrupted the proceedings. Overall the attorneys seemed most troubled, distracted and self-conscious. The jurors appeared to be affected least.

The Circuit Judges Conference undertook a survey of trial court judges which was also submitted to the Florida Supreme Court for consideration. Despite the fact that a majority of the responding judges had a neutral or favorable

reaction to the presence of the media, the executive committee of the Conference declined to encourage modification of Canon 3A (7). The judges surveyed also reported that jurors, witnesses, and attorneys did not seem to have been swayed or affected by the presence of the media.

A third study concerned the experience in the Eighteenth Judicial Circuit. It was submitted by Judge David Strawn with the assistance of researchers at Florida Technical University. The first half of the study reported "Opinions of Trial Participants and Observers at Five Trials Involving Camera Coverage". The second half covered a "Summary of Opinions Expressed by County Judges regarding the Use of Cameras in the Courtroom."

Gavel-to-gavel coverage of two Circuit court murder trials also took place during the pilot program. Both judges submitted reports to the Florida Supreme Court. The presence of cameras in each courtroom was pursuant to the strict rules laid out by the Supreme Court in Petition of Post-Newsweek Stations, Florida, Inc., 347 So. 2d 404 (Fla. 1977). Elements of the coverage such as the number and placement of cameras, pooling arrangements, the appointment of a court-media liaison, and the operations of a separate media press room/control room were regulated according to the guidelines. The Miami public broadcasting station WPBT played nightly tape-delayed broadcasts of long portions of each trial and made tapes available to the commercial stations which utilized them in evening newscasts.

Photographs appeared in local newspapers.

One of the cases, State of Florida v. Ronny Zamora, was uniquely media-related. Not only was it televised but it concerned a media defense. Charged with murder of an elderly neighbor, fifteen year old Zamora claimed that he was a television addict. "Television intoxication" prohibited Zamora from being able to appreciate whether he was acting in a television crime drama or engaging in real-life violence. The unusual defense was unsuccessful, for Zamora was found guilty. Nevertheless, Judge Paul Baker reported that the case "must be viewed as a success" (Report, p. 17) in that it proved the feasibility of televising a trial. Going beyond a recommendation that disruption was minimal and the trial met fairness standards, Judge Baker suggested that videotaped materials could aid appellate court review:

"The printed record standing alone does not indicate voice inflections, facial expressions, a witness' demeanor, the demeanor of the trial judge or the conduct of counsel. It is recommended the Supreme Court reevaluate its prohibition against the use of film, videotape, still photographs and audio reproductions for the purpose of appellate review at the conclusion of this pilot program.

(Report at p. 21)

Judge Thomas Sholts presided at the other broadcast

trial, State of Florida v. Herman. In his evaluation report to the Florida Supreme Court he noted that the equipment had been unobtrusive and not disruptive, that the media personnel had cooperated fully, and that the attorneys had not engaged in histrionics. Regardless, Judge Sholts concluded that media coverage "creates unnecessary problems at the risk of great possible prejudice" (Report p. 16).

Judge Sholts described the strains of a four-day long individual pre-qualifying voir dire covering topics which included pretrial publicity and views toward television; holding one of the witnesses in contempt for refusing to testify for fear for her safety (partly influenced by the media coverage); bomb threats; and rejecting the defendant's objections to broadcasting. Factors which often arise as objections to coverage were cited by the judge even though they were not raised during Florida v. Herman. These included the potential impact on defendants and jurors, the possibility that the quality of trial testimony would be impaired, and the ancillary matters a trial judge would have to supervise. Judge Sholts predicted that it was "only criminal cases, particularly those dealing with lurid murder and sex offenses" that would be televised to entertain the public if coverage were to be permitted permanently.

If the Supreme Court were inclined to allow coverage, Judge Sholts recommended that strict regulation of the media be imposed. He also suggested that the media pay the costs of

courtroom remodeling, sequestration, and overtime of court personnel; and that the trial judge have complete discretion. In addition, he suggested that further studies be done before amending the Canon, to determine whether or not broadcasting is actually prejudicial to defendants. In addition to the Sholts report, the jurors and court personnel in the Herman trial participated in an opinion survey conducted by Florida Technological University by filling out a questionnaire at the end of the trial. The results showed that participants did not find the equipment interfered with the trial. They were not tense themselves, but were uncertain as to the fairness to the defendant. They did not think the judge had been intimidated or the attorneys affected.

Permanent Coverage Allowed.

In an April 12, 1979 decision, the Florida Supreme Court ordered that media coverage be permitted on a permanent basis. Canon 3A (7) of the Code of Judicial Conduct was amended to state the following, effective May 1, 1979:

"Subject at all times to the authority of the presiding judge to (i) control the conduct of proceedings before the court (ii) ensure decorum and prevent distractions, and (iii) ensure the fair administration of justice in the pending cause, electronic media and still photography coverage of public judicial proceedings in the appellate and

trial courts of this state shall be allowed in accordance with standards of conduct and technology promulgated by the Supreme Court of Florida."

The decision is primarily a recapitulation of the history of the Florida experiment, Canon 35, and the Supreme Court cases. The studies by the Judges Conference and the Judicial Planning Unit were given great weight. The decision also analyzes and dismisses six arguments against allowing coverage. The court stated that as a result of technological advancements physical disruption is no longer an arguable factor. The feared psychological effects of coverage were unsubstantiated during the pilot program. Regarding the possible exploitation of the court for commercial purposes, and the potential for prejudicial publicity the court stated that the same problems are faced with print media and the system as is. As to the effects on particular categories of witnesses such as juveniles, the court called for "an articulated standard for the exercise of the presiding judge's discretion in determining whether it is appropriate to prohibit electronic media coverage of a particular participant." (Report, p. 25). Finally as to the privacy of participants, the court concluded that there is no constitutional guarantee of a right of privacy. Therefore, the Court decided that

". . . on balance there is more to be gained than lost by permitting electronic media coverage of judicial proceedings subject to standards for such

coverage. The prime motivating consideration prompting our conclusion is this state's commitment to open government. . .

Electronic media coverage of all other branches and subdivisions of Florida government exists and apparently has served not only to inform the public about the operation of their government but has made the representatives of government act more responsibly. . .

Ventilating the judicial process, we submit, will enhance the image of the Florida bench and bar and thereby elevate public confidence in the system.

(Report at pages 27, 28, 29)

In view of the experimental data and reports of the Florida judiciary, the Florida Supreme Court voted overwhelmingly in favor of permanent television coverage of court proceedings without requiring the consent of trial participants.

There are, however, appeals pending before the Florida Supreme Court, each of which alleges that broadcast on television of the proceedings against a criminal defendant resulted in a violation of the right to a fair trial. In response, the prosecution is contending that, as a general matter, this issue has been resolved by the decision of the court to allow permanent coverage.

GENERAL CONCLUSIONS

1. There appear to be no significant problems inherent in media coverage of appellate proceedings with the exception of certain interlocutory matters.
2. Of most interest to the media is coverage of the criminal trial which occurs in Superior Court. It is with that type of trial that the greatest possibility of harm exists. Because of this, the Justices of the Superior Court may have special concerns to be considered.
3. Improper coverage may require a lengthy continuance of a trial, a mistrial or a reversal of a conviction. Experience suggests that, with respect to mistrials and reversals, the defendant may, in fact, never be retried.
4. There is no legal right to privacy upon which the broadcast of a public judicial proceeding may infringe.
5. The right to a public trial under the Sixth Amendment is satisfied by the current rule of court governing media coverage of judicial proceedings. There is no legal obligation to allow for expanded coverage.
6. The First Amendment protects the right of the press to communicate information once it is obtained. Absent extraordinary circumstances, the court may not infringe upon the media's right to publish recorded material.

7. There is a lack of conclusive research on the effects which media coverage may have on the participants in a trial, on others who may be collaterally affected and on the inherent fairness of judicial proceedings which are subject to broadcast.

8. An experimental period of coverage with an empirical research component provides the best opportunity to study and judge the actual coverage of trials.

9. The results and experiences of other states allowing media coverage should provide valuable assistance.

10. If the consent of all parties in a trial is required, experience indicates that it will rarely, if ever, be granted.

RECOMMENDATIONS

Based upon the conclusions which the Committee has formed from its consideration and analysis of the rules and experiences of other jurisdictions; and, provided that all representatives of the media are understood to have a responsibility to conduct their reportage of the judicial system in such a way as to maintain the integrity and decorum of the judicial process, the Committee recommends the following:

I. General Recommendation:

- A. Media coverage of all Massachusetts court proceedings presently open to the press should be permitted for an experimental period during and after which the effects of such coverage on the participants and all others affected should be subjected to empirical analysis and reported to the Supreme Judicial Court.
- B. The experiment, its plan, analysis and evaluation should be designed by a special committee subject to the approval of the Supreme Judicial Court.
- C. The experiment should be for a one year period or for such other time as is necessary to obtain sufficient data.
- D. The terms of the experiment should vary to reflect the differing types of problems which media coverage may present for various types of court proceedings.

With respect to the formation of a special committee and the terms and conditions of the experiment, the committee makes these further recommendations:

A. The Special Committee

The special committee should consist of a limited number of members, each of whom should have expertise in or familiarity with the matter at hand.

1. Membership on the committee should include representation of trial court judges, attorneys, and members of the media.
2. The committee should seek assistance in designing, analyzing and evaluating the experiment from appropriate individuals and organizations with expertise in social science research.
3. The committee should be authorized to seek funds and engage necessary staff.
4. The Committee should be responsible for the full conduct of the experiment.

B. The Experiment

The experiment should be designed to reflect the following general terms and conditions:

1. With few exceptions, e.g. interlocutory considerations of motions to suppress, full and unrestricted media coverage of the appellate courts, should be permitted during the experimental period.

2. Media coverage in the trial courts should be permitted during the experimental period so that sufficient information may be gathered to enable the special committee to draw informed conclusions concerning the effect, if any, which media coverage may have on the inherent fairness of the proceedings and on the participants and others affected. Media coverage should be permitted subject to the following general conditions:
 - a. Pre-trial matters: Media coverage of pre-trial matters should generally be permitted. If, however, the judge finds that substantial likelihood of harm to any person or party will result from such coverage, he may limit or temporarily suspend said coverage provided that the judge shall file a written statement of his reasons for limiting or suspending said media coverage. This statement should be used for purposes of evaluating the experiment.

- b. Trials: As a rule, the public aspects of trials should be generally open to media coverage. The electronic and photographic media, therefore, should be afforded the same accessibility to trials as the press has enjoyed. Since certain exceptions may be required due to inherent differences in the types of media, the trial judge may limit or temporarily suspend said media coverage if it appears that a substantial likelihood of harm to any person or party will result from such coverage or for such other special reason as the judge shall specify. The trial judge shall file a statement of the reasons for such suspension or termination. The statement should be used for evaluating the experiment.
1. Bench conferences may be photographed but not recorded for sound.
 2. Private communications between attorney and client may not be subject to sound recording.
 3. Proceedings which are presently closed to the public should not be open to coverage.

C. Educational Interchange

Procedures should be established by the special committee for the regular discussion of problems and interchange of viewpoints among concerned representatives of the bench, the bar, the media and the public so that the purposes of the experiment may be fully achieved.

D. Equipment and Procedures for providing coverage.

Though it is the position of the Committee that the specific requirements of the experiment be left to the special committee to determine, the following observations may be helpful:

1. Electronic Video equipment: The electronic videotape coverage of all proceedings should be limited to one unobtrusive video camera capable of recording without additional lighting equipment. Positioning of the camera should be subject to agreement; provided, however, that no movement of the camera other than the ordinary movement of the camera head should be permitted while the court is in session.
2. Motion picture cameras: These should be subject to substantially the same requirements as the video camera.

3. Still photographic cameras: Still photography of courtroom proceedings should be limited to one camera without motor drive.
4. Audio Equipment: Desk microphones should be unobtrusively positioned in the courtroom subject to agreement and should not be moved while court is in session. In many instances, the loudspeaking equipment presently installed is adequate for media use, requiring only an audio jack. Shotgun, long-range or directional microphones should not be permitted.
5. Lighting equipment: No flash attachments or additional lighting equipment should be permitted.

MINORITY STATEMENT

I respectfully disagree with the Committee's recommendation that the Supreme Judicial Court authorize electronic media coverage of jury trials during the recommended experimental period. The considerations which lead me to disagree are set out, hopefully in succinct fashion, in this Minority Report.

For identification purposes, it should be noted that I am in private practice, specializing primarily in criminal defense work and also civil litigation. I was appointed to the Advisory Committee as a representative of the Criminal Justice Section of the Massachusetts Bar Association, upon the recommendation of the President of the MBA. However, the views in this report are my own and they should not be construed as an expression of the position of the Criminal Justice Section.

For the reasons hereinafter set forth, I believe that electronic media coverage of jury trials should not be permitted at this time.

1. The only legitimate basis for restricting electronic media coverage of judicial proceedings is the possible adverse effect of such coverage on the participants in the proceeding itself. Concerns about possible adverse effects from publicity should be resolved on the basis of the fair trial-free press

standards currently applicable to the so-called print media.

2. There is widespread concern among criminal defense lawyers that television coverage of criminal jury trials may produce subtle or unconscious pressures on jurors to be responsive to public attitudes and community pressures, and therefore that television coverage may affect the impartiality and independence of juries. It is not certain that this phenomenon will occur. But the fact that this concern is shared by such a large majority of criminal defense lawyers indicates that there is a substantial risk the fairness of trials will be affected.

3. What little empirical data there is on the effect of electronic media coverage is not encouraging. After a one year experimental period in Florida, the Office of the State Courts Administrator produced a report based on surveys of the participants in televised trials.¹

The Florida report contains the following findings:

--Electronic coverage made one-quarter of the jurors nervous. Almost 5% of the jurors were made "very" or "extremely" nervous. (Section One, Page 6, Q. 11)

--Electronic media coverage made almost one-half of the witnesses nervous, and over 10% of the witnesses "very" or "extremely" nervous. (Id.)

--25% of the jurors surveyed were opposed to electronic media coverage, 35% of the surveyed witnesses were opposed, 41% of court personnel were opposed, and 42% of the attorneys were opposed. (Section One, Page 9, Q. 18)

1. This report is cited on page 30 of the Committee Report. The full title of the report is "A Sample Survey of the Attitudes of Individuals Associated with Trials Involving Electronic Media and Still Photography Coverage in Selected Florida Courts between July 5, 1977 and June 30, 1978", The Judicial Planning Coordination Unit, Office of the State Courts Administrator.

--71% of the court personnel expressed the opinion that electronic media coverage made the jurors self-conscious. 17% of the court personnel believed that the coverage made jurors "very" or "extremely" self-conscious. Of the attorneys surveyed 67% believed the coverage made jurors self-conscious, and 23% believed it made the jurors "very" or "extremely" self-conscious. (Section Two, Page 7, Q. 13)

--59% of the court personnel and 57% of the attorneys believed that electronic media coverage made the jurors nervous. 15% of court personnel and 14% of attorneys expressed the opinion that the coverage made jurors "very" or "extremely" nervous. (Section Two, Page 8, Q. 15)

4. Valuable lessons may be learned from the experience of having television cameras in the courtroom for appellate and pre-trial proceedings, and for non-jury proceedings in the District Courts. We will gain at least some first-hand knowledge about the relative merits of different camera placements and other technical aspects of electronic media coverage. We will gain some experience with respect to the effects of such coverage on judges, attorneys and other personnel in the courtroom. We will gain insights into the effects, if any, of electronic media coverage on the dignity and decorum of judicial proceedings.

Because a jury trial is admittedly the type of judicial proceeding involving the greatest risks in terms of electronic media coverage, it is advisable to experiment with electronic coverage of other types of judicial proceedings first.

5. A period of electronic media coverage of judicial proceedings other than jury trials will allow future jurors and witnesses to become acclimated and sensitized to the presence

of television cameras in the courtroom. If jury trials are included in the initial experimental period, jurors appearing for duty in the courtroom will be totally unfamiliar with the presence of cameras and the fact of television coverage. With an initial period that does not include jury trials, members of the public will become accustomed to seeing coverage of court proceedings on their home televisions before they appear as jurors or witnesses to find a television camera in the courtroom. This familiarization process should reduce the impact of television coverage on the trial participants.

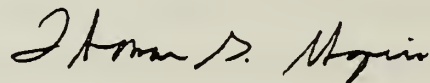
6. Experimental programs are now being conducted in at least 11 states. See Committee Report, page 10. It would appear to be prudent to see what results emerge from at least some of these experiments before Massachusetts takes unnecessary risks with respect to the fairness of trials. Certainly Massachusetts will want to make its own decision, and may well decide to conduct its own experiment before reaching a final decision. But the advantages of waiting for some results to appear from other states outweigh any disadvantage of a moderate delay in permitting electronic media coverage.

7. It should be remembered that we are not writing on a clear slate, but that we do have a tradition of excluding electronic equipment from courtrooms, reputedly to maintain judicial decorum and dignity. In this context, we should

give careful consideration to whether allowing television cameras in the courtroom will appear to commercialize judicial proceedings and to make them vehicles for entertainment. Accordingly, I believe it is important that we move gradually and carefully in this area.

In a public television debate viewed by the committee, the point was made that the purpose of the courts is not to inform the public, but to do justice among the parties. The right of public and media access to the courts is a fundamental one which I strongly support. The issue under consideration is not one of public or media access. The issue instead is the form of the access, or more precisely whether television cameras should be permitted in addition to television reporters.

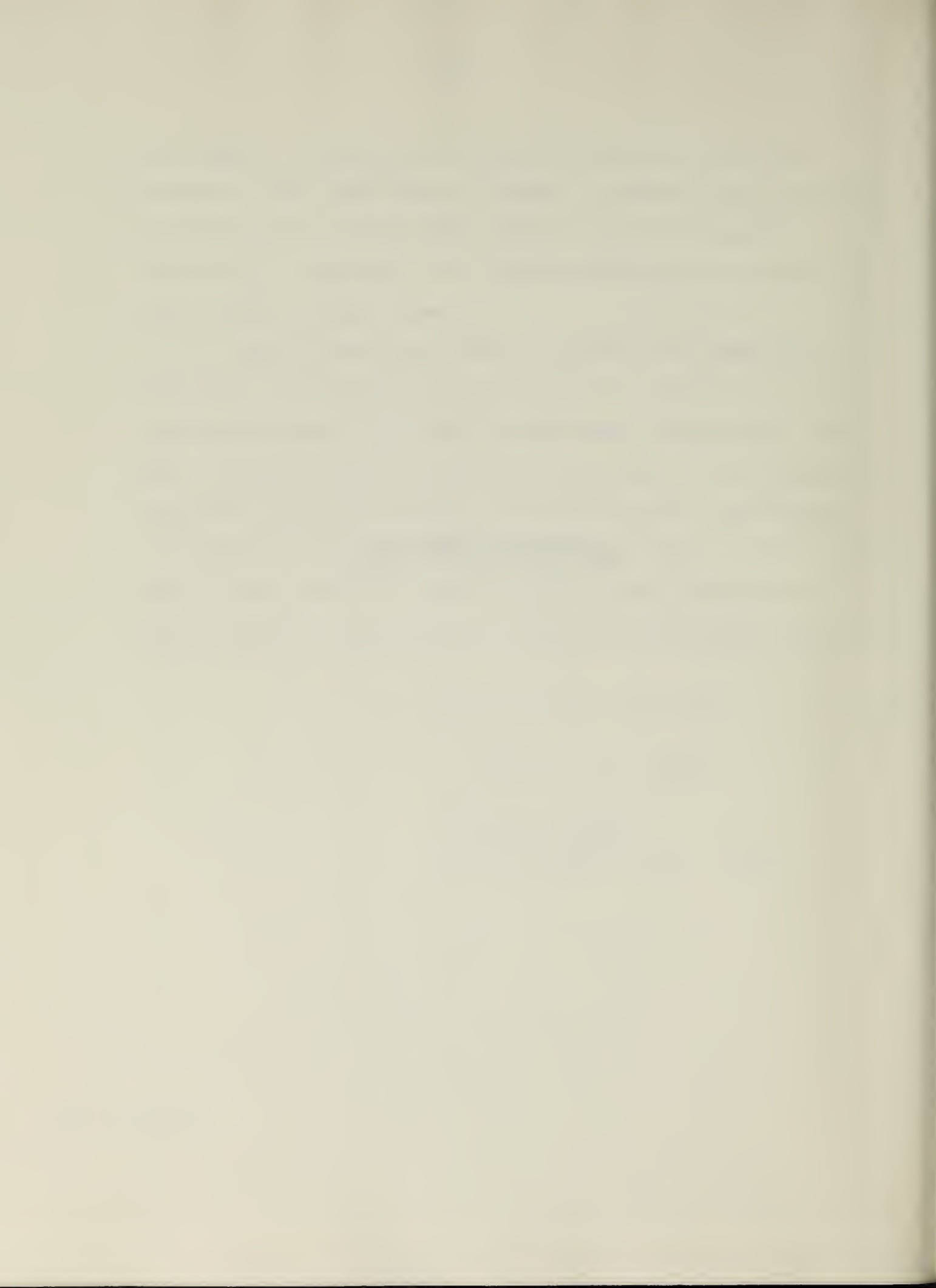
Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Thomas G. Shapiro". The signature is fluid and cursive, with the first name "Thomas" being more prominent.

Thomas G. Shapiro
33 Broad Street
Boston, Massachusetts 02109
Tel. 723-2624

CONCURRING REPORT OF
ATTORNEY JACK J. MIKELS

May 29, 1979



I. INTRODUCTION

At our initial meeting, members of the Advisory Committee on Media Coverage of the Courts voted that only those issues decided by a consensus of the Committee would be included in the final report. As a result, a number of suggestions which did not win majority support are excluded from the Committee Report. Some of these suggestions merit mention and, perhaps, further consideration.

This Concurring Report is intended as a supplement to, and not a criticism of, the Committee Report. It is a recognition of the difficulty of a large Committee, representing differing and conflicting viewpoints, to concur on disputed issues. The Committee's ability to put forward so many specific recommendations is a tribute to the leadership of Judge Travers and the dedication of the Committee's members and staff.

II. INSOFAR AS POSSIBLE, MEMBERS OF THE ELECTRONIC MEDIA SHOULD BE TREATED EQUALLY TO MEMBERS OF THE PRINT MEDIA

(NOTE: As utilized herein, the term "electronic media" applies to members of the media who use equipment currently barred from the courtroom, i.e., video, motion picture and still cameras and radio broadcasting equipment).

In its fourth meeting, the Committee voted that: "Insofar as possible, members of the electronic media should be treated equally to members of the print media." The vote, one shy of being unanimous, was one of several votes which indicated that a consensus of the Committee favored a change in Rule 3:25.

At the same time, the Committee recognized potential dangers in opening the courtrooms to electronic equipment. Would witnesses testify accurately before television cameras? Would some witnesses fail to come forward and testify? How would jurors react to the expanded media coverage of the evidence? Could a "carnival atmosphere" be avoided and a fair trial guaranteed?

Unable to answer these questions, the Committee wisely recommended opening the Courts to the electronic media, and its equipment, for an experimental period, subject to the review of a second, more specialized committee.

III. COVERAGE OF APPELLATE COURT ARGUMENTS SHOULD BE OPENED TO THE ELECTRONIC MEDIA, WITHOUT AN EXPERIMENTAL PERIOD

The Committee recognized that the problems inherent in the broadcasting of trials do not exist at the appellate court level. Committee Report, p.44. Nevertheless, the Committee voted that electronic media coverage of appellate

court proceedings should be subject to the same experimental period as coverage of the trial courts.

The Committee's decision appears to rest on a reluctance to allow the broadcasting of "certain interlocutory matters". Committee Report, pps. 39, 44. The fear of Committee members, as expressed during our meetings, was that excluded evidence in a criminal case might be broadcast to jurors and the public.

Clearly, the broadcast of excluded evidence is a serious matter. The effect on jurors of seeing the "blood-soaked sweater", excluded as prejudicial, or hearing the defendant's confession, excluded as involuntary, may be considerable. The public's mistrust and misunderstanding of the trial and the judiciary would abound.

It should be recognized that the media has proven itself responsible in its coverage of the courts. The Massachusetts Bar Association Bar-Press Guide, a copy of which is affixed to the Committee Report, serves as a model for the media and suggests avoiding: "Broadcasting (or publication) of confessions after an indictment is returned unless made a part of the evidence in the court record" and "Broadcasting (or publication) of testimony stricken by the court unless reported as having been stricken." Committee Report, Appendix 3, pps. 3, 5.

Further, the problem of broadcasting excluded evidence involves the broad issue of whether media coverage of interlocutory matters is appropriate. Rule 3:25 presupposes that media coverage is appropriate and involves solely the question of what tools the media may utilize.

Rule 3:25 currently allows a radio reporter to quote from an appellate argument, but not to record it. Similarly, a newspaper may publish sketches showing what happened in a courtroom, but may not photograph the same proceeding. These rules apply even if the media could work noiselessly and unobtrusively.

As a practical matter, appellate arguments are seldom of interest to the media. A battery of lawyers, making complex legal arguments to a panel of judges, is not the material from which exciting broadcasts are made. Nevertheless, the question remains as to whether the electronic media, where it desires to cover the appellate court, should be stripped of its equipment at the courthouse door.

The advent of modern communications equipment eliminates the need to ban such equipment from the courtroom. Still cameras no longer require flashes; small video cameras, without yards of obnoxious cables, can be strategically placed so as not to interfere with the proceedings; tape recorders can be connected to the existing sound system, or compact and noiseless models may be utilized. In this regard, Rule 3:25 is as obsolete as the equipment it was designed to affect.

I concur with the Committee that an experimental period is necessary, in which electronic media coverage of trials may be studied. Even if this recommendation is adopted by the Supreme Judicial Court, electronic media coverage of trials is not an immediate prospect. The process of forming a second committee to oversee the experiment, obtaining funding, retaining social scientists and implementing the experiment will be long and difficult.

Since the problems inherent in electronic coverage of trials do not exist for appellate court arguments (as distinguished from appellate court trials), such proceedings should be opened immediately to the electronic media, without an experimental period. However, such coverage should be subject to the same limitations imposed on electronic media coverage suggested by the Committee Report. See, Committee Report, pps. 40-41 and subpart D entitled "Equipment and Procedures for providing coverage". These limitations are summarized only insofar as changes may be desired, as follows:

(1) Camera coverage should be limited to two cameras. I believe that unnecessary camera movement will result from the one camera limitation suggested by the Committee.

It would be difficult, if not impossible, for one camera to adequately cover both an attorney and the judge(s). In the trial situation, the same camera would also have to cover the witness and important objects such as blackboards or charts. An additional camera may be less conspicuous than one camera with a constantly moving head;

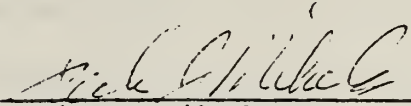
(2) The judge's right to restrict coverage should be limited to (a) those situations in which the public and press may already be barred or coverage may already be limited and (b) extraordinary situations where necessary to protect the rights of any person. Some Committee members recommended the formation of a special three-person tribunal, consisting of a judge, an attorney and a representative of the media, to review a trial judge's decision to suspend, terminate or otherwise limit media coverage of trials; and

(3) Private communications may not be subject to sound recording. This should include not only attorney-client communications, but conferences between attorneys and all other private communications.

IV. CONCLUSION

Subject to these limitations, and the other limitations recommended in the Committee Report, coverage of

appellate court arguments should be opened to the
electronic media, without an experimental period.



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APPENDIX I

Date: March 26, 1979

TO: Advisory Committee on Media Coverage

FROM: Committee Staff

RE: Certain Questions for consideration.

This memo suggests a basic approach to the primary issues before this committee and raises some questions which members should consider in addressing the matter of camera coverage in the courts.

The committee members should feel free to supplement the list by submitting questions and comments.

I. The essential question is whether television and photographic coverage of court proceedings should be allowed beyond the limited exceptions contained in S.J.C. Rule 3:25 Canon 3A(7).

Before responding to this issue though, the committee must first consider whether the presence of cameras in the courtroom and the expectation of broadcast either before or shortly after the conclusion of a trial will have an adverse effect upon the fairness of the proceedings.

For example, will cameras;

a) impair the amount or quality of testimony offered by witnesses;

- b) influence the independent judgment of jurors;
- c) subject jurors to external pressures as a result of increased publicity;
- d) create a tendency for "grandstanding" by attorneys, or, conversely, inhibit the presentations of camera-shy lawyers;
- e) pressure or influence judges in making rulings of law, fact or dispositions;
- f) create undue administrative burdens for judges;
- g) create a cause célèbre effect which sensationalizes the trial process or otherwise detracts from the dignity of the proceedings?

In addition, the committee must determine what benefits might flow to the court system, the parties, the public and the media if coverage were to be expanded. Here, the members might consider their views on:

- 1) the relationship between the need for privacy and the right to open and public trials;
- 2) whether the media or the public has the right to cover trials on demand under a freedom of information, freedom of the press, or other constitutional rationale; and
- 3) whether the parties, witnesses, jurors, judges, or other court personnel have the right not to be televised or, conversely, do participants in a trial have a right to be televised.

II. It would appear that the committee could respond in any of several ways. It could conclude:

1) that cameras represent a fundamental obstacle to a fair proceeding, and, therefore, the current prohibition should prevail;

2) that cameras would create no significant alteration in the character of judicial proceedings and, therefore, in view of the foreseeable benefits, should be permitted; or

3) that there is an insignificant amount of evidence available to determine the likely effects of cameras on a trial, and, therefore, an experimental period or other information-gatherings process is desirable.

For any other than the first of these suggested responses, the committee should also consider the rules, guidelines, conditions, and other related questions which it may wish to report to the S.J.C. concerning the implementation of the expanded camera coverage policy. A partial list of some of these items is contained in the following pages. Please enter your views in the appropriate space and return this portion in the enclosed envelope.

(Note: Please return this portion by April 4th. Thank you.)

III. The following, then, are some of the questions for consideration if the committee should decide that a more permissible policy toward cameras in the courtroom is warranted on either a permanent or experimental basis.

1) Should coverage be allowed on a permanent or experimental basis? permanent _____

experimental _____

neither _____

a) if experimental:

for how long a period? _____

b) in which locations:

by particular county _____

by particular court _____

by other method _____

2) If an experimental period is desirable, what type of information-gathering or evaluation methods concerning the effects of cameras should be employed? _____

3) How should coverage be allowed for civil and criminal cases? _____

for trial and appellate matters? _____

4) Should any conditions be placed on the broadcasting (publication) of recorded material? _____

Upon the editing of such material? _____

5) May recorded material be broadcast prior to the full resolution of a proceeding? _____

Prior to delivery of a verdict in a trial? _____

6) Should coverage be allowed for pre-trial sessions:

a) arraignments _____

b) motion sessions _____

c) should any conditions apply? _____

7) If publicity of a case by its particular nature or fact pattern is likely to injure, harm or embarrass a participant, may special considerations be invoked by the judge? By another? What conditions? _____

8) What authority to allow or restrict coverage ought to be vested in the trial judge? the arraignment or motion-session judge? the appellate judge? _____

9) Should coverage be allowed in a restricted fashion as in Florida, as a matter of "right" or should consent of the parties, witnesses, and/or jurors be necessary? _____

10) May any party or person connected with the trial invoke a right to have all or part of a trial televised? Should the media have any obligation to respond to such requests?

11) Within any framework of consent, may a party or individual connected with a proceeding invoke any right not to have certain segments of a proceeding televised?

a) witnesses _____

1. protected witnesses _____

2. undercover agents _____

b) minors _____

12) Should photographing the jury be allowed/prohibited?

May individual jurors be allowed to object to coverage? _____

13) Should coverage of the jury pool, the empanelling process, or juror deliberations be allowed? _____

14) If prior consent is given by a witness, party, etc. may it then later be effectively revoked in whole or in part?

How? _____

15) Can or should any methods be devised to attempt to guard against undue distortion or sensationalization of courtroom proceedings? _____

16) How may a party be protected against broadcast of prejudicial evidence or testimony which is entered and then ruled improper or entered improperly? _____

May a judge order that certain portions of a proceeding not be broadcast for this reason? _____

17) What conditions are necessary so that privileged communications (as between lawyer and client) and communications that are intended to be private, such as bar conferences, are protected? _____

18) What types of equipment may be employed by the media?

a) audio— 1) individual miking_____

2) area miking_____

b) video— 1) cameras_____

2) lights_____

3) switchers, monitors, recorders, cables,
wires, etc._____

c) still cameras_____

d) motion picture cameras_____

19) How much equipment may be permitted

a) in court_____

b) in corridors, hallways, outside of court_____

20) How should the positioning of the equipment be
determined?_____

a) when may it be installed, restationed and removed?

21) Should the movement of broadcast/ photographic
personnel be restricted in court?_____

22) How should the amount of shutter noise of a still
camera be minimized?_____

a) Is it desirable to limit the number of still
photographs which may be taken?_____

23) What conditions should apply to the installation and removal of equipment? _____

24) What rules if any should govern the operation of the television pool? the photographers' pool? _____

25) Should restrictions be placed on the loading of film or changing of lenses or lights during a proceeding? _____

25) During a voir dire process, is it necessary to include a question as to whether the existence of television coverage might adversely effect any juror's ability to be impartial? _____

26) Should juries be sequestered during proceedings that are televised? If so, who should bear the cost? _____

Thank you for your prompt reply. Please feel free to include additional pages with other comments, questions or remarks which you wish to make.

Please use this space to list further comments, questions, suggestions, etc. Thank you.

May 29, 1979.

APPENDIX II

The following is a summary of the rules in the various states.

States Which Permit Coverage on a Permanent Basis

- Alabama Canon 3(a) of the Alabama Canons on Judicial Ethics (effective 1-1-76) authorizes the broadcasting, televising, recording or taking of photographs in a courtroom at the discretion of the trial judge or appellate court. This authorization is limited by the requirements that 1) a plan for the particular courtroom has been authorized by the Alabama Supreme Court; 2) in a criminal trial, the defendant and the district attorney for the county must give prior written consent; 3) in a civil case, all parties and their attorneys must give prior written consent; 4) in any trial, coverage will be suspended if a witness, juror, party or attorney expressly objects.
- Colorado Colorado has permitted electronic and photographic coverage of trials since 2-7-56. Such coverage is allowed only by order of the trial judge and only under conditions he may set. Prior consent of a criminal defendant is required. The coverage is suspended if a witness or juror in attendance under subpoena or order of the court expressly objects.
- Florida The Supreme Court authorized permanent coverage on April 12, 1979. Neither the consent of the trial judge nor of any other trial participants is required.
- Georgia The Supreme Court of Georgia (since 5/12/77) may authorize electronic media coverage of a judicial hearing if it has given prior approval of the plan and if the judge presiding over the hearing assents. No mention is made

in Canon 3A(8) regarding consent of parties, attorneys, jurors or witnesses. It is therefore presumed that guidelines on consent must be set out in any plan submitted to the Supreme Court for approval.

- New Hampshire New Hampshire Supreme Court has authorized (effective 1/26/79) electronic media in trial courts provided (1) camera and personnel are out of the view of the jury; (2) the trial judge has given permission; (3) the jury shall not be photographed in the courtroom; (4) cameras are prohibited on the objection of the court, an attorney, party or witness. No prior consent of parties, attorneys or witnesses is required. The Supreme Court has authorized coverage of its proceedings since 1/1/78.
- Tennessee The Tennessee Supreme Court has revised Canon 3A(7) to allow coverage of all court proceedings. Consent of the parties is required and objection by participating counsel will preclude coverage.
- Texas The Texas Supreme Court has authorized electronic media coverage of oral arguments in the appellate courts of Texas since 11/9/76. Prior consent of the court is required. No prior consent of the parties is required.
- Washington. The Supreme Court has authorized (effective 9/20/76) electronic coverage of trial sessions provided the presiding judge gives permission. Coverage will be suspended upon prior objection of any party, witness or juror.

States Which Permit Electronic Coverage
on an Experimental Basis

- Alaska Effective September 18, 1978 to September 14, 1979, by order of the Alaska Supreme Court, Canon 3A(7) allows electronic coverage of all judicial proceedings in the Anchorage Court House provided 1) a plan has been approved by the Supreme Court; 2) the presiding judge and counsel for all parties give prior permission; 3) electronic coverage is suspended upon objection by a witness, juror, or party.
- Arizona The Arizona Supreme Court has authorized, effective May 31, 1979, coverage of its proceedings for a one-year experimental period. Consent of the parties is not required.
- California The Judicial Council has approved a one-year experimental coverage. Guidelines are being considered by a special committee expected to make a report in June, 1979.
- Idaho The Idaho Supreme Court authorized coverage of its proceedings on an experimental basis from 12/4/78 to 6/30/79. No prior consent is required of the Court. Objections by the parties shall not affect coverage. The Court reserved the right to limit coverage at its discretion.
- Louisiana The Louisiana Supreme Court authorized live coverage of all proceedings in the Ninth Judicial District for Rapides Parish on an experimental basis from 2/23/78 to 2/23/79. Prior written consent of the parties and their counsel, including the victim in a criminal trial, is required. No provisions are made for suspension of coverage for express objection of the witnesses or jurors.
- Minnesota The Minnesota Supreme Court authorized coverage of its proceedings on an experimental basis for a one-year period starting January 28, 1978. There are no requirements for consent of the parties or for suspension of coverage upon their objection. Coverage is at the discretion of the Court.

- Montana The Supreme Court of Montana ordered a change in Canon 35 of the Montana Canons of Judicial Ethics allowing coverage for two years effective 4/1/78. Permission must be obtained from the presiding judge and in the event of a prohibition, the judge must state his reasons on the record. No prior consent of the parties is required and objection by the witnesses or jurors does not effect a suspension of the coverage.
- New Jersey The New Jersey Supreme Court has recently authorized, effective May 1, 1979, coverage of trial and appellate proceedings in two counties. Coverage is on an experimental basis for one year or until six trials have been covered. Consent of the parties is not required, but the presiding judge may suspend or terminate coverage for cause.
- North Dakota The North Dakota Supreme Court authorized an amendment to Canon 3A(7) of the North Dakota Code of Judicial Conduct allowing coverage of its proceedings for a twelve-month period, effective 2/1/79. While prior consent of the parties is not necessary, prior objections are considered by the Court in its decision to allow coverage in each case.
- Ohio The Supreme Court of Ohio has authorized a one-year experiment allowing coverage of trial and appellate proceedings, effective June 1, 1979. Consent of the parties is not required but the presiding judge may suspend or terminate coverage for cause.
- Oklahoma The Oklahoma Supreme Court has revised Canon 3A(7) of the Code of Judicial Conduct to allow coverage for an experimental period of one year, effective 1/1/79. The trial judge must grant permission for such coverage. No prior consent of the parties is required. An express objection by a witness, juror or party shall preclude the photographing, televising or broadcasting of the person objecting.

West Virginia The Supreme Court has approved a six-month experiment, effective 1/22/79, in Monogalia County (Morgantown) Circuit Court. Consent of the parties is not required. There are no provisions for termination on objection by witnesses or jurors.

Wisconsin The Wisconsin Supreme Court has amended Rule 14 of the Code of Judicial Ethics to allow coverage of all court proceedings for a period of one year, effective 4/1/78. The Court adopted the standards used by the Florida court system in its experiment. Neither the consent of the trial judge nor of any of the trial participants is required.

In addition to courts currently providing for coverage, other states are considering the possibility. These include Arkansas, Delaware, Massachusetts, Nebraska, Nevada and Rhode Island. Nevada allowed the televising of a murder trial in June, 1976 on the conditions that all parties would consent and the videotape would not be aired until the appeal process had ended. North Carolina has allowed coverage for "instructional" purposes only since 9/23/73.

*MASSACHUSETTS BAR ASSOCIATION
BAR-PRESS GUIDE*

MASSACHUSETTS GUIDE FOR THE BAR AND NEWS MEDIA

BILL OF RIGHTS

ARTICLE I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

ARTICLE VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

MASSACHUSETTS NEWSPAPER INFORMATION SERVICE
MASSACHUSETTS BAR ASSOCIATION
MASSACHUSETTS BROADCASTERS ASSOCIATION
BOSTON BAR ASSOCIATION

Adopted 1962

1. GUIDE FOR THE PRESS

PREAMBLE

1. To promote closer understanding between the bar and the press, especially in their efforts to reconcile the constitutional guarantee of freedom of the press and the right to a fair, impartial trial, the following mutual and voluntary statement of principles is recommended to all members of both professions.

2. Both professions, recognizing that freedom of the press is one of the fundamental liberties guaranteed by the First Amendment to the United States Constitution, agree that this fundamental freedom must be zealously preserved and responsibly exercised subject only to those restrictions designed to safeguard equally fundamental rights of the individual.
3. It is likewise agreed that both the press and the bar are obliged to preserve the principle of the presumption of innocence for those accused of wrongdoing pending a finding of guilty.
4. The press and the bar concur on the importance of the natural right of the members of an organized society to acquire and impart information about their common interests.
5. It is further agreed, however, that the inherent right of society's members to impart and acquire information should be exercised with discretion at those times when public disclosures would jeopardize the ends of justice, public security and other rights of individuals.
6. The press and the bar recognize that there may arise circumstances in which disclosures of names of individuals involved in matters coming to the attention of the general public would result in personal danger, harm to the reputation of a person or persons or notoriety to an innocent third party.
7. Consistent with the principles of this preamble, it is the responsibility of the bar, no less than that of the press to support the free flow of information.

FOR THE PRESS

Newspapers in publishing accounts of crime should keep in mind that the accused may be tried in a court of law.

To preserve the individual's right of a fair trial, news stories of crime should contain only a factual statement of the arrest and attending circumstances.

The following should be avoided:

1. Publication of interviews with subpoenaed witnesses after an indictment is returned.

2. Publication of the criminal record or discreditable acts of the accused after an indictment is returned or during the trial unless made part of the evidence in court record. The defendant is being tried on the charge for which he is accused and not on his record. (Publication of a criminal record could be grounds for a libel suit.)
3. Publication of confessions after an indictment is returned unless made a part of the evidence in the court record.
4. Publication of testimony stricken by the court, unless reported as having been stricken.
5. Editorial comment preceeding or during trial, tending to influence judge or jury.
6. Publication of names of juveniles involved in juvenile proceedings unless the names are released by the judge.
7. The publication of any "leaks," statements or conclusions as to the innocence or guilt, implied or expressed, by the police or prosecuting authorities or defense counsel.
8. Publication of names of surviving victims of forceable sex crimes. (Adopted by MBA Board of Delegates, 12/13/77)

2. GUIDE FOR BROADCASTING INDUSTRY

PREAMBLE

1. To promote closer understanding between the bar and the broadcast news media, especially in their efforts to reconcile the constitutional guarantee of freedom of the press and the right to a fair, impartial trial, the following mutual and voluntary statement of principles is recommended to all members of both professions.
2. Both professions, recognizing that freedom of the press is one of the fundamental liberties guaranteed by the First Amendment to the United States Constitution, agree that this fundamental freedom must be zealously preserved and responsibly exercised subject only to those restrictions designed to safeguard equally fundamental rights of the individual.

3. It is likewise agreed that both the broadcast news media and the bar are obliged to preserve the principle of the presumption of innocence for those accused of wrongdoing pending a finding of guilty.
4. The broadcast news media and the bar concur on the importance of the natural right of the members of an organized society to acquire and impart information about their common interests.
5. It is further agreed, however, that the inherent right of society's members to impart and acquire information should be exercised with discretion at those times when public disclosures would jeopardize the ends of justice, public security and rights of individuals.
6. The broadcast news media and the bar recognize that there may arise circumstances in which disclosures of names of individuals involved in matters coming to the attention of the general public would result in personal danger, harm to the reputation of a person or persons or notoriety to an innocent third party.
7. Consistent with the principles of this preamble it is the responsibility of the bar, no less than that of the broadcast news media to support the free flow of information.

FOR THE BROADCAST NEWS MEDIA

The broadcast news media in news stories originated by them concerning a crime should keep in mind that the accused may be tried in a court of law.

To preserve the individual's rights to a fair trial, news stories of crime should contain only a factual statement of the arrest and attending circumstances.

The following should be avoided:

1. Broadcasting of interviews with subpoenaed witness after an indictment is returned.
2. Broadcasting of the criminal record or discreditable acts of the accused after an indictment is returned or during the trial unless

made part of the evidence in the court record. The defendant is being tried on the charge for which he is accused and not on his record. (Broadcasting of a criminal record could be grounds for a libel suit.)

3. Broadcasting of confessions after an indictment is returned unless made a part of the evidence in the court record.
4. Broadcasting of testimony stricken by the court unless reported as having been stricken.
5. Editorial comment preceding or during trial, tending to influence judge or jury.
6. Broadcasting of names of juveniles involved in juvenile proceedings unless the names are released by the judge.
7. The broadcasting of any "leaks," statements or conclusions as to the innocence or guilt, implied or expressed, by the police or prosecuting authorities or defense counsel.
8. Broadcasting of names of surviving victims of forceable sex crimes. (Adopted by MBA Board of Delegates, 12/13/77)

3. GUIDE FOR THE BAR

To preserve the individual's rights to a fair trial in a court of law the following guide lines are prescribed for the Bar.

1. A factual statement of the arrest and circumstances and incidents thereof of a person charged with a crime is permissible but the following should be avoided:
 - (A) Statements or conclusions as to the innocence or guilt implied or expressed, by the prosecuting authorities or defense counsel.
 - (B) Out-of-court statements by prosecutors or defense attorneys to news media in advance of or during trial, stating what they expect to prove, whom they propose to call as witnesses, or public criticism of either judge or jury.

- (C) Issuance by the prosecuting authorities, counsel for the defense or any person having official connection with the case of any statements relative to the conduct of the accused, statements, "confessions" or admissions made by the accused or other matters bearing on the issue to be tried.
 - (D) Any other statement or press release to the news media in which the source of the statement remains undisclosed.
2. At the same time, in the interest of fair and accurate reporting, news media have a right to expect the cooperation of the authorities in facilitating adequate coverage of the law enforcement process.

In an attempt to reconcile long-standing divergence of opinion as to the relative rights of the press and that of the individual to a fair trial, a special Massachusetts Bar-Press Committee was established in the fall of 1960. After two and a half years of study and discussion, the Committee, with the aid of observers from the judiciary, drafted a Guide which was approved by the Committee. Subsequently ratified by the sponsoring groups, the Guide was adopted by 26 daily and 31 weekly newspapers in this State. The Broadcasting Guide was also adopted by the Massachusetts Broadcasters Association.

